ARONSON & ASSOCIATES, P.A.
IMMIGRATION ATTORNEYS

SPECIAL NEWSLETTER:
NEW PROVISIONS FOR NATIONAL INTEREST WAIVERS

February 13, 2007

Dear Clients and Friends:

I am sending this Special Newsletter to you as an initial analysis of the guidelines that have just been released by U.S. Citizenship and Immigration Services (USCIS) on the National Interest Waiver procedures for physicians.

Just to review briefly, our immigration laws contain provisions enabling a foreign national to attain permanent resident status upon a showing that his/her ongoing residence in the United States will benefit the national interests of this country. The National Interest Waiver provisions were initially introduced in the Immigration Act of 1990 (IMMACT 90). During the majority of the 1990s, these provisions were widely utilized by the medical community to qualify many physicians for permanent resident status under a highly streamlined filing policy. However, an administrative court decision in 1998 compelled the legacy INS to significantly restrict National Interest Waiver eligibility for foreign physicians by requiring them to show superior, outstanding abilities having broad national implications. As a consequence, nearly all community-based physicians became excluded from National Interest Waiver coverage. In light of the emerging shortages in the domestic physician workforce and the very serious negative consequences that resulted from a lack of access to qualified healthcare practitioners, the Congress passed legislation on September 6, 1999, restoring National Interest Waiver eligibility to physicians who agree to work for a five-year period of time specifically in designated medically underserved areas or VA facilities.

Since September 2000, the actual administration of these National Interest Waiver provisions for physicians has been governed by a highly restrictive set of regulations that were promulgated by legacy INS. Among the more contentious and questionable provisions appearing in these regulations were a limitation of National Interest Waiver eligibility solely to primary care physicians and strict time parameters within which a physician needed to complete his/her five-year service obligation. As a consequence, specialty care physicians working in designated medically underserved areas were excluded from National Interest Waiver eligibility despite the fact that they qualified for J-1 waivers in light of the importance of encouraging physicians to relocate to communities experiencing physician shortages.

For a comprehensive discussion of the National Interest Waiver provisions for physicians, kindly refer to my article entitled “Value in Search of Meaning: National Interest Waivers Practice for Physicians.” http://www.aronsonimmigration.com/article/2004-value-niw.htm

In June 2006, the Ninth Circuit Court of Appeals issued a decision in the case of Schneider v Chertoff, which challenged certain standards utilized by USCIS in adjudicating National Interest Waiver Petitions for physicians. This Court decision represents the first judicial review of the implementation of the National Interest Waiver provisions for physicians. Essentially, the Court found that the USCIS regulations interpreted the federal statute in an unfairly restrictive manner. While the Court did not render any pronouncement on whether National Interest Waiver eligibility should be limited solely to primary care physicians, it did rule that the regulations contained various artificial and unwarranted limitations on the scope of National Interest Waiver eligibility for physicians.

In the aftermath of this Court decision, USCIS has now released interim guidance that not only incorporates certain central holdings of the Schneider v Chertoff case, but also revises a number of other provisions on how these National Interest Waiver provisions are to be applied. The primary changes made by this new USCIS directive include the following:

1. **National Interest Waiver eligibility will no longer be limited solely to primary care physicians, but rather will be extended to specialty care physicians who are practicing in designated medically underserved areas.** This directive specifically recognizes that various other federal programs contain inducements intended to encourage medical specialists to take up practice opportunities in designated medically underserved areas, such that it runs counter to public policy to limit National Interest Waivers solely to primary care doctors.

2. **There will no longer be a mandatory six-year limit within which a physician needs to complete his/her five-year service obligation in a designated medically underserved area or a VA facility.** For many physicians, this artificial time limitation proved to be of great hardship, particularly if additional training was required or abnormalities arose in licensing or credentialing. However, this new directive provides USCIS with the discretion to determine if a physician is making "meaningful progress toward completing the National Interest Waiver employment obligation."

3. **This new guidance statement recognizes that all periods of lawful employment undertaken by a physician in a medically underserved area or VA facility should be applied toward fulfillment of the five-year employment obligation.** Previously, the regulations had contained highly artificial distinctions as to what periods of a physician's employment could be applied toward the five-year service obligation. Under these revised guidelines, all periods occurring after the conclusion of a physician's J-1 period of Graduate Medical Education will count toward National Interest Waiver fulfillment, which certainly makes sense given the law's stipulation that a five-year period of employment in a qualifying practice site should be sufficient for National Interest Waiver purposes.

4. **These revised guidelines retain two important reporting obligations:** 1) The need to file within a 120-day period following the second and sixth anniversary of the approval of the National Interest Waiver Petition so as to enable USCIS to determine if the physician is making meaningful progress toward fulfillment of the five-year service obligation; and 2) Upon the physician's fulfillment of his/her five-year obligation, the medical examination reports and confirmation of employment need to be provided to USCIS so that the physician's request for permanent residence can be approved.

5. **A physician will preserve his/her claim to permanent residence even if the geographic area subsequently loses its designation as a medically underserved area.** There had been considerable uncertainty whether a physician's immigration case would be compromised if the community or geographic area later lost its shortage designation. These guidelines stipulate that once a physician starts to work in a medically underserved area (such as following issuance of a J-1 waiver), the withdrawal of shortage designation will not undercut the physician's subsequent right to process for permanent residence under a National Interest Waiver, as long as a legitimate case can be made that the physician is providing meritorious services to the indigent and the medically underserved.

6. **The guidelines specifically state that it is possible to file a concurrent National Interest Waiver and Adjustment of Status Application even while the physician resides in J-1 status.** This provision provides a streamlined, time-efficient method for a physician and his/her dependants to obtain employment authorization. However, these National Interest Waiver guidelines do not address another provision of the law, which imposes a mandatory three-year period, specifically in H-1B status, for physicians who receive J-1 waivers. Unless these J-1 waiver-related provisions are changed, all such physicians still need to work for three years,

specifically in H-1B status, before utilizing an Employment Authorization Document (EAD) obtained through this National Interest Waiver approach.

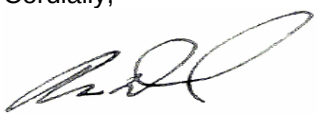
7. **In order to obtain approval of a National Interest Waiver, the guidelines reiterate the need of a physician to obtain within the previous six months a contract or employment commitment letter and a public interest letter issued by the state (rather than local or county) department of health.**

In their most practical and essential terms, these new guidelines are particularly important in the following two arenas: 1) they open up National Interest Wavier eligibility to medical specialists working in designated medically underserved areas; and 2) they firmly establish that all periods of lawful employment in a medically underserved area or a VA facility (following the conclusion of a physician's J-1 Program) should be counted toward fulfillment of the five-year employment obligation. Hopefully, these new guidelines will also provide an impetus to USCIS to revisit some of its interpretations affecting J-1 waivers – most notably, the stipulation that such physicians need to maintain H-1B status exclusively for a three-year period following issuance of the J-1 waiver.

In this ensuing period of time, we intend to continue in our efforts to promote more favorable federal immigration policies that will benefit physicians working in underserved communities. We certainly intend to work with our current and prospective clients who might benefit from these new National Interest Waiver provisions, particularly those physicians practicing specialty medicine.

As always, please feel free to contact us with any questions or concerns on this or any other aspect of physician-related immigration.

Cordially,



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